

Subject: Docket No. 060228057-6057-01
From: "Carlile, Tim" <CarlilT@wsdot.wa.gov>
Date: Mon, 14 Aug 2006 13:15:17 -0700
To: <orcahabitat.nwr@noaa.gov>

Attached is the Washington State Department of Transportation's response to the above referenced Docket Number, regarding the Proposed Critical Habitat Designation for the Southern Resident Killer Whale Population.

Orca NPRM Draft PW comments (7).doc	Content-Description: Orca NPRM Draft PW comments (7).doc Content-Type: application/msword Content-Encoding: base64
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August 17, 2006

Chief, Protected Resources Division
1201 NE Lloyd Blvd
Suite 1100
Portland, OR 97232-1274

RE: Proposed Critical Habitat Designation for the Southern Resident Killer Whale Population, Docket No. 060228057-6057-01

Dear Sir/Madam:

The Washington State Department of Transportation (WSDOT) appreciates the opportunity to comment on this proposal. We would like to acknowledge the difficult task of creating regulations governing the critical habitat for a species for which limited information exists regarding its diverse habitat needs.

WSDOT recognizes the Southern Resident Orca population is endangered. We are committed to environmental protection and working with federal, state and local government agencies, tribes and community organizations both to protect and assist the recovery of the Orca population, and to create and sustain a healthy Puget Sound ecosystem. As much as possible in our own programs, we use best available technology and construction methods to avoid and minimize impacts on federally protected species and other species in and around Puget Sound and the state.

WSDOT operations and facilities in the proposed critical habitat area

WSDOT has highway, ferry and aviation owned or affiliated operations and facilities in and near the proposed critical habitat area:

We own and operate a number of highways and bridges which are located in or near the proposed critical habitat area.

Washington State Ferries operates 24 vessels and 20 ferry terminals on ten routes with nearly 500 sailings per day in the proposed critical habitat area.

WSDOT Aviation is affiliated with more than 40 seaplane landing areas¹ in the Puget Sound region, and offers services to approximately 2,800 pilots² in the state holding a seaplane rating. Within the proposed critical habitat area there

¹ The directory is available at: <http://www.wsdot.wa.gov/aviation/SeaplaneBases/default.htm>

² Federal Aviation Administration, Airmen Certification Branch. July 12, 2006.

are five seaplane bases (SPB)³ - Rosario, Roche Harbor, Friday Harbor, Skyline and Poulsbo - that provide services including dock facilities and fueling stations. Friday Harbor SPB is included in the FAA's National Plan of Integrated Airport Systems (NPIAS)⁴, and is eligible for federal funding.

The five seaplane bases serve approximately 14,000 operations⁵ annually and, according to a 2001 study conducted by WSDOT Aviation, the bases combined generate \$5 million⁶ annually.

Much of the work needed to operate and upgrade these facilities is subject to section 7 consultation under the ESA and WSDOT is designated as a non federal representative for ESA consultations for both the FHWA and Army Corps of Engineers. It is in that context that we analyze the proposal's possible operational, environmental and financial implications and offer our comments on the NPRM.

Attached to this document is a brief summary about WSDOT.

Summary of comments

Quantify thresholds for water quality impacts. Because water quality thresholds have not been quantified in the economic analysis, it is impossible to respond with a meaningful analysis of the potential impacts to WSDOT. Given recent discussions on project consultations for listed salmonids, there is reason to believe this could be a significant impact.

Focus on the quantity and quality of stormwater, instead of the number of stormwater outfalls as the rule suggests. We suggest that habitat enhancement and protection can occur more quickly and cost-effectively if NMFS focuses on the characteristics of individual stormwater outfalls.

Consider all stormwater sources. The proposed rule focuses on state highway stormwater outfalls though they are only a very small contributor of the total stormwater discharge in the proposed critical habitat area. The analysis also relies upon an incomplete inventory of state highway outfalls. We suggest that more effective habitat enhancement and protection will occur only through identifying and analyzing the impact of all stormwater sources.

Use an updated, complete inventory of WSDOT stormwater outfalls. The inventory of WSDOT outfalls in the economic analysis is incomplete.

³ A seaplane base is defined as, "An area of water used or intended to be used for the landing and takeoff of aircraft, together with [associated] shore-side buildings and facilities." *Advisory Circular 150/5395-1: Seaplane Bases*. Federal Aviation Administration, 2004.

⁴ The National Plan of Integrated Airport Systems (NPIAS) identifies more than 3,300 airports that are significant to national air transportation and thus eligible to receive Federal grants under the Airport Improvement Program (AIP). The NPIAS is available at: http://www.faa.gov/airports_airtraffic/airports/planning_capacity/npias/.

⁵ An operation is defined as a single take-off or landing.

⁶ *Economic Impacts of Washington Airports*. WSDOT, 2001, <http://www.wsdot.wa.gov/aviation/EconImpacts/default.htm>

More thoroughly identify the contaminant compounds and metals NMFS will likely evaluate and/or regulate. Without this information it is nearly impossible for us to identify water quality concerns that would likely impact WSDOT operations and facilities – particularly those of the ferry system.

Noise impacts should not be a Primary Constituent Element. We believe potential impacts of noise on killer whales would be best addressed at the species level, which would allow for consideration of potentially mitigating factors such as duration, time of year, and location of elevated noise levels when considering impacts to the species.

Present at least a partial list of the type of projects that would likely require section 7 consultations. Although we would agree NMFS probably can't predict all actions that would require section 7 consultations, we believe NMFS has enough experience with these issues that it should be able to present at least a partial list of the type of projects that would likely require section 7 consultations. This would greatly assist action agencies and project proponents in anticipating ESA related concerns and costs.

Assess costs associated with changes to water quality rules. Obtaining an order of magnitude cost estimate is necessary for action agencies and project proponents to financially manage current and future projects.

Clarify at which tidal level the 20 foot shallow limit applies. To better assist affected stakeholders we recommend that NMFS clarify whether the 20 foot shallow limit applies at any or all tidal levels or a particular level/stage.

Clarify NMFS's expectations for section 7 consultations for current or future operations of Washington State ferry vessels. NMFS acknowledges the effect of vessels is directly on the whales rather than an effect on their habitat.

Regulations should accommodate the differences between seaplane and boat operations. Seaplane operations differ significantly from boats, and should not be subject to the same restrictions placed on boats and other vessel traffic.

Regulations should reflect the necessary and useful flexibility of seaplane access. The ability of seaplanes to conduct in-water landings and takeoffs at almost any location contributes to the important value of providing access to locations that are remote or otherwise underserved by other modes of transportation.

Detailed comments on impacts of proposed critical habitat designation

1. Quantify thresholds for water quality impacts.

A “key finding” of the economic analysis is that the economic impacts to stormwater management activities are not quantified because water quality thresholds have not been quantified:

“This analysis also considers potential impacts of critical habitat on water quality management activities qualitatively in Section 3. Absent specific information on water quality thresholds that are considered protective of killer whales and habitat, impacts to these activities are not quantified (Industrial Economic, Incorporated 2006, page ES-3).”

NMFS is soliciting information on water quality management activities that may trigger section 7 consultations, potential modifications of those activities, and estimated costs of those modifications. It is impossible to respond in a meaningful way to an impacts analysis that does not quantify thresholds for impacts. Depending on the thresholds chosen and the resulting effects on requirements stormwater treatment, this has a potential to be a very significant economic effect. This shortcoming raises a large question as to the adequacy of the economic analysis.

2. Focus on quantity and quality of stormwater, not the number of outfalls.

The economic analysis incorrectly implies that the number of stormwater outfalls is correlated with the quantity of contaminants in receiving water. There is no direct correlation between number of outfalls and contaminant loading in receiving waters. The quantity of contaminants reaching receiving waters varies dramatically with land use of contributing area, contributing area size, presence / absence of best management practices, whether or not the outfall is an infiltration facility, and a variety of other variables.

We suggest the focus should be on the characteristics of individual stormwater outfalls. This would enable a focusing on the outfalls which will yield the largest benefit for habitat improvement.

3. Consider all stormwater sources and contributions.

If the number of WSDOT outfalls is included in the economic assessment, it should be noted that outfalls of state highways are a subset of all outfalls in the proposed critical habitat area. WSDOT stormwater outfalls are the only stormwater outfalls specifically mentioned (and quantified in table 3-7) and thus seem to be singled out by ownership in the document when they are known to be a small fraction of the outfalls in the area of interest. The economic analysis states that:

“While stormwater outfalls may or may not be consulted on by NOAA Fisheries associated with killer whales, an inventory of highway stormwater outfalls is presented in Exhibit 3-7 Industrial Economic, Incorporated 2006, page 3-9).”

City and county outfalls, like WSDOT outfalls, may or may not contain a Federal nexus and result in section 7 consultations by NOAA Fisheries. The economic analysis should

include city and county stormwater outfalls as well, so that all stormwater sources and their relative contributions are in context.

Snohomish County (http://www.co.snohomish.wa.us/PWApp/SWM/drainage_maps/TR2805.html) and other municipalities have inventories of their outfall that can be used to perform a more complete analysis.

4. Use an updated, complete inventory of WSDOT stormwater outfalls.

The numbers of WSDOT outfalls are misrepresented in the economic analysis as a complete inventory in the economic analysis. The WSDOT outfall inventory is a work in progress and is not a complete inventory of all WSDOT outfalls in the areas of interest. We encourage your coordination with WSDOT to develop appropriate estimates of outfalls in future analyses.

5. More thoroughly identify the contaminant compounds and metals NMFS will likely evaluate and/or regulate.

Federal Register text: 34573 (a), "Physical or Biological Features Essential for Conservation, (Primary Constituent Elements)", third paragraph.

Although the Federal Register notice does not, the June 1, 2006 IEc Draft Final Report (*Economic Impacts Associated with Potential Critical Habitat Designation for the Southern Resident Population of Killer Whales*) lists 3 metals of concern to cetaceans and list other contaminants that are of concern (ES-6, 3-3, Exhibit 3-1). However, neither the FR or IEc report identify contaminant compounds and metals that NMFS will likely seek more restricted regulation of, or those compounds and metals that will be evaluated as to whether or not they should be more restricted. Therefore it is difficult for us to identify water quality concerns that would likely impact WSF facility design, construction or operations.

Accordingly, we request that NMFS more thoroughly identify the contaminant compounds and metals that NMFS will likely seek more restricted regulation of, and those compounds and metals that will be evaluated as to whether or not they should be more restricted.

6. Noise impacts should not be a Primary Constituent Element (PCE).

Federal Register text: 34573 (b), "Physical or Biological Features Essential for Conservation, (Primary Constituent Elements)", third column; and Federal Register text: 34584 (b), "Public Comments Solicited", Comment Solicitation #2

We believe potential impacts of noise on killer whales would be best addressed at the species level and sound should not be included as a PCE under critical habitat. This would allow for consideration of potentially mitigating factors such as duration, time of year, and location of elevated noise levels when considering impacts to the species. If sound becomes listed as a PCE, NMFS needs to clearly correlate sound effects to orca CH (in terms of adverse modification), and be specific enough to avoid unfounded speculation at the staff level during consultations.

7. Present at least a partial list of the type of projects that would likely require section 7 consultation to assist agencies and project sponsors.

Federal Register text: 34578 (b), "Impacts of Designation Generally", last sentence of first paragraph:

"For actions related to water quality management, we consider it too speculative to predict either the actions that might undergo ESA section 7 consultation or the types of changes we might seek."

Although we would agree NMFS probably can't predict all actions that would require section 7 consultations, we believe it is inaccurate and imprudent to indicate NMFS can not predict a significant body of actions that would likely require section 7 consultation.

Water quality has been proposed as a designated PCE of the Critical Habitat for the Southern Resident Orca population and NMFS has experience in consultation about actions that have potential water borne contaminate impacts upon the regions' ESA protected Salmon Evolutionarily Significant Units (ESUs).

As a result, we expect NMFS to be able to present at least a partial list of the type of projects that would likely require section 7 consultations associated with the designated Critical Habitat. We would expect this list to include many of the types of actions that have been or are currently in section 7 consultations and have potential water born contaminate impacts on the regions' ESA protected Salmon ESUs'. Given that the scope of the this change could be a significant cost factor for project proponents, a more thorough representation is justified to assist action agencies and project proponents to anticipate ESA related concerns and costs.

8. Assess costs associated with changes to water quality rules.

Federal Register text: 34581, "Economic Impacts (Economic Benefits of Exclusion)" third sentence:

"We consider it too speculative at this time to postulate likely consultations on water quality management actions, and what changes we might seek in those actions."

Comments above (#7, for page 34578 (b)) also apply here. In contrast to the draft *Designation of Critical Habitat for Southern Resident Killer Whales Draft 4(b)(2) Report* and the IEC final draft report *Economic Impacts Associated with Potential Critical Habitat Designation for the Southern Resident Population of Killer Whales*, we believe that, as a minimum level of effort, an order of magnitude assessment of costs associated with changes to water quality rules should be developed. The increased water quality costs realized by actions that have or are currently responding to section 7 consultations for protected salmon ESUs, which represents another case where the water quality criteria is not well defined, should have produced a viable body of cost data.

In turn, this data can be used to assess the potential water quality related costs due to a change in water quality criteria associated with the maintenance of the critical habitat for the Southern Resident Orca population. Obtaining an order of magnitude cost estimate is necessary for action agencies and project proponents to financially manage current and future projects.

9. Clarify at which tidal level the 20 foot shallow limit applies.

Federal Register text: 34584 (a), first column, "Critical Habitat Designation", first paragraph, second sentence:

"We are proposing to designate approximately 2,564 square miles (6,641 km) of marine habitat within the area occupied by the Southern Resident killer whales in Washington. Although waters with less water than 20 feet (6.1 meters) deep are not proposed for critical habitat,"

To better assist affected stakeholders we recommend that NMFS clarify whether the 20 foot shallow limit applies at any or all tidal elevation or a particular elevation / stage.

10. Clarify NMFS's expectations for section 7 consultations for current or future operations of Washington State ferry vessels.

Federal Register text: 34578 (a), "Impacts of Designation Generally", fourth sentence of first paragraph.

NMFS acknowledges the effect of vessels is directly on the whales rather than an effect on their habitat:

"The only vessels we identified with a section 7 nexus were U.S. vessels, such as military, Coast Guard, etc., and ferries, which receive federal funding. However, since these vessels do not affect the whales' ability to pass freely among areas, we do not anticipate section 7 consultations will have any habitat-related impacts on operations of these vessels"

We understand that NMFS does not anticipate vessel operations to have an effect on killer whale habitat. We request that NMFS clarify if they expect that section 7 consultations would be needed for current or future operations of Washington State ferry vessels regarding the Killer Whale species listing.

11. Regulations should accommodate the differences between seaplane and boat operations.

Seaplanes differ significantly operationally from boats, and should not be subject to the same restrictions placed on boats and other vessel traffic. For example, the impact of seaplanes on the water is minimal. Seaplane propellers are located above the water, have a shallow draft (the depth of pontoons is typically less than one foot) and can land in shallow water.

In-water operations are typically short in duration because seaplane pilots limit water travel for operational efficiency. In addition, pilots are highly trained to identify and avoid obstructions, do not operate in rough water, and travel only in daylight hours.

12. Regulations should reflect the necessary and useful flexibility of seaplane access.

The ability of seaplanes to conduct in-water landings and takeoffs at almost any location contributes to the important value of providing access to remote locations. Restrictions placed on the location, speed, time of day or season of vessel traffic, or on the operation and improvements to seaplane bases, could restrict the flexibility of seaplane operations

in Puget Sound and therefore reduce transportation access to locations which are remote or otherwise underserved by other transportation modes.

Travel by seaplane provides transportation access and recreation opportunities, and is especially significant in the Puget Sound and San Juan Islands, where geography limits the number of transportation alternatives. Seaplanes are also used for emergency medical transportation and emergency response. Both private citizens and commercial service carriers use seaplanes for transportation access. Kenmore Air provides seaplane flights to destinations in the Puget Sound⁷, including 12 San Juan Island locations. The company's scheduled service to the San Juan Islands serves 40,000 passengers each year. The airline's charter service serves an additional 6,000 passengers annually to various locations in the Puget Sound.

Thank you for the opportunity to comment on the proposed recovery plan.

Sincerely,

Paula J. Hammond, P.E.
Chief of Staff

Attachment

cc: Jennifer Ziegler
Mike Anderson
John Sibold
Don Nelson
Steve Reinmuth

⁷ Data provided by Tim Brooks, Airport Manager, Kenmore Air Harbor, Inc.

ATTACHMENT

About WSDOT

WSDOT is responsible for maintaining 7,000 miles of highways and 3,300 bridges and tunnels, including the longest and widest of the world's first floating bridges. WSDOT collaborates with local transit agencies to provide bus and other transit services.

The Washington State Ferries (WSF) is a division of WSDOT; it is the largest ferry transit system in the United States and one of the state's most popular tourist attractions. It carries approximately 24 million passengers and 11 million vehicles annually on 200 miles of marine highway. WSF operates 24 vessels and 20 ferry terminals. WSF provides service along 10 ferry routes with nearly 500 sailings per day including critical links between Seattle and other urban areas on the east side of Puget Sound, and growing communities on the Kitsap Peninsula and San Juan Islands. WSF also operates one international route to Canada.

WSF is a vessel operator and a marine terminal/facility developer and operator subject to State, Federal, and International laws, regulations, and standards applicable to ferry vessels operating on the waters of Washington State, the United States, and Canada.

WSDOT Aviation is responsible for protecting, preserving and enhancing 139 public use general aviation airports including 6 emergency airfields and providing services to pilots.

WSDOT became a cabinet agency in July 2005 and the Secretary of Transportation reports to the Governor. WSDOT continues to work with the Washington State Transportation Commission on transportation policy issues and long term investment planning.